

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

IN RE:)	Case No. 02-30218
)	Chapter 7
Alonzo McClain,)	
)	
Debtor.)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND ORDER (DIRECTING
)	CREDITOR TO FURNISH STATEMENTS
)	AND OTHER ACCOUNT
)	INFORMATION)
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This matter was heard on April 25, 2002 on the Debtor's Motion to Allow Chrysler Financial (or more properly, DaimlerChrysler Services North America, LLC) to Send Monthly Statements. Both parties were represented by counsel.

FINDINGS OF FACT

The relevant facts are not in dispute.

Alonzo McClain filed a Chapter 7 bankruptcy petition in this Court on January 23, 2002. Before bankruptcy, McClain had financed a 2001 Dodge pickup with DaimlerChrysler. As of the petition date, he owed the secured creditor \$22,823.09. However, McClain was current on his payments when he filed.

In his Statement of Intentions, McClain stated a desire to keep his truck and to continue to make monthly payments to DaimlerChrysler. This is known as "keeping current," an option made available to Chapter 7 debtors who are current on their secured claims, per 11 U.S.C. § 521 (2002) and *In Re Belanger*, 962

F.2d 345 (4th Cir. 1992). McClain served a copy of his Statement of Intentions on DaimlerChrysler.

DaimlerChrysler replied with a letter to McClain's attorney advising that since the debtor had not reaffirmed its debt (another option under Sections 521& 524(c)), DaimlerChrysler would no longer send monthly invoices to McClain, as it had before bankruptcy.

McClain then filed the present motion. In it, he asks this Court to authorize DaimlerChrysler to send him these statements and other account information.¹

Daimler Chrysler resists this relief, and has announced an intention to appeal any decision requiring it to do so. Its stated position is that invoicing McClain after his bankruptcy, even if he asks it to, would cause DaimlerChrysler to violate the bankruptcy stay (Section 362) and/or his discharge (Section 524).

McClain argues that this is not only an unreasonable concern by the lender, but that without this information, it will be very difficult for him to exercise the *Belanger* "keep current" option as to this simple interest loan.

As of the hearing date, McClain had not yet received his discharge.²

¹McClain says that DaimlerChrysler is also refusing to provide him with other account information, such as payoff and escrow balances.

²At this point, the Rule 4004 period for filing objections to discharge/dischargeability had not run, so McClain had not yet received his discharge. This means that he could still elect to reaffirm the DaimlerChrysler debt. A reaffirmation agreement must

LEGAL CONCLUSIONS

The issue to be decided today is a question of first impression in this District. Simply stated, when a Chapter 7 debtor, who being current on a secured claim at the date of bankruptcy and thereafter, elects to retain the collateral and "keep current" on the secured claim per *Belanger*, may his lender thereafter refuse to send him account statements and other information pertaining to that *in rem* secured claim due to his bankruptcy?

Held: In this situation, the creditor may not refuse to provide the debtor account information when its requested. To permit a lender to "go silent" on the account would deny the debtor the information necessary to exercise the "keep current" option and therefore violates *Belanger*.

Second, where a Chapter 7 debtor has stated his intent to "keep current," a creditor which simply provides coupons, statements and other account information necessary for the debtor to pay the *in rem* claim, this violates neither the automatic stay nor the discharge injunction.

Finally, in this case DaimlerChrysler's refusal to provide this information does not appear motivated by a reasonable concern that this would violate these bankruptcy laws. Rather, it is

be made prior to discharge. § 524(c)(1).

intended to force McClain to reaffirm the debt instead of "keeping current." This also violates *Belanger*.

LEGAL CONCLUSIONS

I. Where a Chapter 7 debtor exercises the "keep current" option as to a secured claim, his Lender may not refuse his request to continue to receive statements and other account information provided to other borrowers.

A consumer chapter 7 debtor carries into bankruptcy not only a bundle of unsecured claims, but usually two or three secured debts as well. Most unsecured claims are simply discharged. However, because debtors often need to keep particular property (houses and cars) postbankruptcy, the Bankruptcy Code offers them several options to treat these secured claims.

A debtor may redeem collateral, by paying the secured creditor the value of the property. 11 U.S.C. § 722.³ Alternatively, he may, with the secured creditor's agreement, retain the property, by reaffirming the debt. 11 U.S.C. § 524(c). Reaffirmation treats an individual debt as if the debtor had never filed bankruptcy. The debtor retains the collateral. However, he also remains liable for the debt to the extent that he was before bankruptcy. That is, the debt exists both on an *in rem* basis (i.e., the property can be repossessed or foreclosed) and on an *in personam* basis (the former debtor can be sued for it). 11 U.S.C. § 524(c)(4).

³This option is rarely chosen, since few debtors have cash with which to purchase assets.

A third alternative available to the Chapter 7 debtor is to simply can surrender the collateral to the lender,⁴ and walk away. Any deficiency claim is treated (and usually discharged) as an unsecured claim. 11 U.S.C. § 521(2)(A).

In order that lenders and trustees are made aware of the debtor's elections, the Code requires the debtor to file a Statement of Intentions with his petition, indicating whether he intends to surrender, redeem or reaffirm. *Id.*; See Official Form 8. It also requires the debtor to carry out his intentions within 45 days. 11 U.S.C. § 521(2)(B).

For the relatively rare case where a debtor is current on a secured claim at the bankruptcy date, the case law recognizes an additional option--that of "keeping current." In *In re Belanger*, the Fourth Circuit Court of Appeals held that chapter 7 debtors who were current on their secured consumer loan installment payments could retain the collateral, after discharge, without either redeeming the collateral or reaffirming the underlying debt. *Belanger*, 962 F.2d 345 (4th Cir. 1992).

The Second, Ninth and Tenth Circuits have ruled similarly, adopting the "keep current" option. *Lowry Federal Credit Union v. West*, 882 F.2d 1543, 1546 (10th Cir. 1989); *In re Boodrow*, 126 F.3d 43, 51 (2^d Cir. 1997); *In re Parker*, 139 F.3d 668 (9th Cir. 1998).

⁴Assuming there is no equity and the Trustee doesn't administer the property.

The First, Fifth, Seventh and Eleventh Circuits have refused to recognize the "keep current" option. *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990); *In re Taylor*, 3 F.3d 1512, 1517 (11th Cir.1993); *In re Johnson*, 89 F.3d 249, 252 (5th Cir. 1996); *In re Burr*, 160 F.3d 843(1st Cir. 1998).

Obviously, the "keep current" option offers the debtor significant advantages over reaffirmation. The "keep current" option makes whether to retain the collateral entirely the debtor's decision. If he keeps the collateral, he also bears little risk of future nonperformance. Having discharged his *in personam* contract liability, he can stop paying and surrender possession of the collateral in the future anytime he wishes.

Contrast this with reaffirmation. Here, collateral may be kept by the debtor only with the lender's consent. Moreover, in reaffirmation the debtor remains personally liable for the entire debt--if he defaults, he not only loses possession but usually can be sued. Consequently, debtors want to "keep current," whereas lenders prefer reaffirmation.

Whether this is fair to the secured lender is not for this Court to decide. *Belanger* is the controlling law in this Circuit. A Chapter 7 debtor with a current account is permitted to keep his property by continuing to pay for it. He may not be forced to reaffirm.

This is where DaimlerChrysler steps over the line. Its 'going silent' on McClain's account, because he did not reaffirm, denies the debtor the information reasonably necessary to exercise the "keep current" option, and coerces him to reaffirm. Both are at odds with *Belanger*.

It is news to no one that the U.S. economy,⁵ indeed the lives of most Americans, depend on consumer purchasing made possible through installment financing. Government statistics reveal that consumer debt levels in this country have soared from about \$400 billion in 1980, to \$1.5 trillion in 2000. In the same year, debt payments by individuals had risen to over 14% of personal disposable income. Meanwhile, personal savings fell to an all time low.⁶

Underlying much of this, the high cost of cars and homes makes it necessary for most Americans to finance these purchases. And where it used to be that an individual got his car loan at a bank, today almost every Fortune 500 manufacturer has a credit division to finance purchases of its products.

It takes little thought to know that few consumers could fulfill their obligations under these financing plans without lender-provided payment coupons, monthly invoices, and account statements.

⁵ In 2000, approximately 67% of GDP related to consumer spending.

⁶ Statistics reported by the AOC and the Federal Reserve.

How many consumers have the discipline, let alone the financial skills necessary to compute payoff balances, principal reductions or escrow balances on their own? How many could accurately determine the interest they paid in a given year?⁷ Where the financing is not for a fixed number of payments over a stated term (as with home equity loans), how many borrowers could keep track of what they owe? What if the interest rate floats (as in variable rate mortgages and some credit lines)? How many then? Obviously, the pool would be limited to finance majors and mathematicians.

And even assuming a consumer was able to do so, how many borrower payments would be lost and misapplied by lenders, if not accompanied with a payment coupon or invoice?⁸ How many consumers would overpay their loans if they could not obtain payoff balances from their lenders? How many home sales could be completed without this information?

The point is obvious. It is essential to consumer borrowers that lenders provide the borrowers with account information and invoices or payment coupons.⁹

⁷As is often necessary for claiming interest deductions on tax returns.

⁸An oft-repeated statement by lenders in stay violation cases is that misapplication of payments was due to the low caliber employees who open the mail.

⁹One can only imagine the number of controversies that would arise as to whether the borrower's account was current, behind, or overpaid. The courts would overflow.

And being necessary to consumers generally, such account information is even more vital to a former bankruptcy debtor seeking to "keep current." Having by their bankruptcy demonstrated an inability to manage their finances--even with such aids--- it is safe to say that without such information, very, very few debtors could do so.

Therefore, to allow DaimlerChrysler to refuse "keep current" Chapter 7 debtors account information and statements eliminates the option. It forces the debtor instead to reaffirm or to surrender.

Belanger rejects this as being contrary to the "fresh start" policy of the Bankruptcy Code:

"Confining an individual [c]hapter 7 debtor to the choices of surrender, redemption or reaffirmation can severely interfere with providing the debtor a fresh start." *Id.*, quoting *In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997).

II. Where the Chapter 7 Debtor exercises the "keep current," option, a Secured Creditor which provides statements, balance and other account information reasonably necessary to paying the in rem claim, violates Neither the Automatic stay nor the Discharge Injunction.

The undersigned finds little merit to DaimlerChrysler's contention that sending these statements would force it to violate the stay or discharge injunction.

Code Section 362 provides in part that, upon the filing of a bankruptcy:

"any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title...." 11 U.S.C. § 362(a)(6).

Similarly, the bankruptcy discharge enjoins:

"the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor...." 11 U.S.C. § 524(a)(3).

These provisions protect the debtor and his property from creditor collection activities so as to effectuate the debtor's congressionally- mandated "fresh start." Giving those provisions "teeth," the Code also states that willful violations may result in the creditor paying the debtor his actual damages, costs, attorneys' fees, and even punitive damages. 11 U.S.C. § 362(h); and See *In re Cherry* 247 B.R. 176 (Bankr. E.D. Va. 2000) (citing other authorities).

And certainly if what DaimlerChrysler were trying to do here was to collect its prepetition claim from a debtor not seeking to retain the collateral and on an *in personam* basis, it would have ample reason to be worried. However, that is not this case.

In the first place, it is the debtor who is asking to receive accounts statements postbankruptcy--implicitly by stating "keep current" in his Statement of Intentions and now explicitly by his motion.

Moreover, this is not an *in personam* collection effort by a wayward creditor. Assuming the debtor will receive a discharge, all that DaimlerChrysler will retain and all that is being proposed to be paid is an *in rem* claim on the collateral. See *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66, 59

(1991). McClain simply wants account statements so that he take the mechanical steps to exercise the "keep current" options--i.e. to pay the in rem claim and thereby keep his truck. Finally, the case law rejects mechanical constructions of Section 362 and 524 which make it impossible to comply with other provisions. The argument which DaimlerChrysler advances--it violates the stay to communicate with the Chapter 7 debtor about his debt---if woodenly applied, would also make it a stay violation to negotiate reaffirmations.

However, the Code contemplates reaffirmation. Reaffirmation requires lender consent, so contact between lender and debtor is necessary. Therefore, courts have created an exception to Section 362(a)(6) with an exception for this purpose:

It appears from the language of Section 362 that almost any attempt made by a creditor to collect a pre-petition debt violates the automatic stay. However, it is critical to read the Bankruptcy Code as an integrated process. By so doing, one can easily recognize the potential tension between the prohibition on collection efforts provided in Section 362(a)(6) and Section 524(c), which authorizes negotiations to secure reaffirmation agreements. Many courts, therefore, have found that creditor collection efforts must be coercive and harassing for those efforts to constitute a violation of the automatic stay. *In re Jamo*, 253 B.R. 115, 124-125(Bankr. D. ME, 2000), citing other authorities.

By analogy, in circuits such as this, where the case law permits the debtor to retain property by "keeping current," it is simply not a Section 362/524 violation to provide him with sufficient account information to effectuate his choice.

III. DaimlerChrysler's Refusal to Provide this Information to McClain was Reasonably Intended to Force McClain to Reaffirm the debt, Rather than Keeping the Account Current. It therefore violates Belanger.

In any event, the undersigned does not believe that DaimlerChrysler is stewing in a pot of concern that it will violate the bankruptcy laws. It just doesn't want to send McClain these statements.

As noted above, it would hardly be a sanctionable act to give him what he asks. If there were any doubt, an order authorizing DaimlerChrysler to do so can be entered. However, DaimlerChrysler not only opposes such an order, but has stated that it will appeal any such order.

This, taken with the letter to debtor's counsel, reveals DaimlerChrysler's true purpose. The refusal to send the debtor's statements is founded on the debtor's (prospective) decision not to reaffirm. (Response, par. 6.)

Being made while there is still time for McClain to change his election, what DaimlerChrysler is saying is both clear and is entirely coercive: 'If you don't reaffirm, we will make it as hard as possible for you to keep the truck.' In short, what DaimlerChrysler is attempting is a rear guard assault on Belanger. This is improper.

IT IS THEREFORE ORDERED:

1. DaimlerChrysler shall furnish McClain with the statements and other account information as it would a nondebtor borrower, in

order that he may effectuate his decision to keep this account current;

2. DaimlerChrysler may, in the event of default, take collection actions as permitted under its loan documents and applicable law, to enforce its *in rem* interests in the truck.

3. Pending a determination of whether McClain will obtain a discharge, the automatic stay remains in effect to prevent *in personam* collection efforts by DaimlerChrysler as against the debtor.

4. Assuming that McClain receives his discharge, then DaimlerChrysler may not attempt to collect on an *in personam* basis against McClain on account of this debt. On the other hand, if McClain is not discharged of this debt, then DaimlerChrysler would retain this right, as well upon a future default.

5. The Debtor shall have his costs and fees of DaimlerChrysler attendant to this matter. Debtor's counsel will file an affidavit seeking forth the amounts sought within fifteen days. DaimlerChrysler shall have an addition fifteen days to respond to the same.

This the 6th day of May, 2002.



Dated as of date entered

U.S. Bankruptcy Judge